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No. 91-546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LATROBE BREWING CO., LABATT IMPORTERS, INC., LABATT'S U.S.A., INC. AND JOHN P. O'CONNELL,

Petitioners,

VS.

TONY SAVATT, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should review the Pennsylvania intermediate appellate court's affirmance of the Chancellor's fact findings that an in-state brewery (Petitioner herein) had constituted Tony Savatt, Inc. (Respondent herein) as a primary distributor on and after the effective date of the Pennsylvania Liquor Code Amendments of 1980?

2. Whether the Pennsylvania Superior Court's application of the termination for good cause provision of the Liquor Code's 1980 Amendments to the contractual relationship between Savatt and Latrobe complied with the intent of the Pennsylvania Legislature?

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Counterstatement of the Case

The "Statement of the Case" set forth in the Petition does not comply with this Court's rule 14 (g) which calls for a "concise statement... containing the facts material to the consideration if the questions presented". Pursuant to Respondent's obligations under Rule 15.1, we set forth the perceived misstatements.[1]

This case did not involve an argument by Respondent Tony Savatt, Inc. ("Savatt") for retroactive application of any law. Quite the contrary, in its equity trial, Respondent argued factually, and the equity Chancellor so found both factually and as a conclusion of law, that after the effective date of the 1980 Liquor Code Amendments, Petitioner Latrobe constituted "Savatt" a "primary distributor". (19a, 25a, 31a) [2]

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[1] Savatt is a Pennsylvania Corporation located in McKees Rocks, Pennsylvania. Respondent has no subsidiaries.

[2] References are to the respective pages of the Appendix contained in the Petition.

Thus, the Chancellor wrote in his opinion:

> Having concluded that the protections of the statute do not extend retroactively to Savatt, the Court must next consider whether or not Savatt was ever a "primary distributor" subsequent to the effective date of the statute. A resolution of this issue requires a review and analysis of the nature of the business relationship between plaintiff and Defendants, and the course of dealing of the parties subsequent to the August 1980 letter. (Emphasis supplied, 25a)[3]

The Chancellor's fact findings and legal conclusions were left undisturbed and relied upon by the Pennsylvania Superior Court. Tony Savatt, Inc. v. Latrobe Brewing Co., ___ Pa. Super. ___, 583 A.2d 796 (1990). The Superior Court's affirmance of these fact findings was similarly not based on a retroactive application:

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[3] This Court should also be aware that this case did involve Petitioners' efforts to control retail prices and not contract impairment. (Factfinding 29, 20a)

The evidence amply supported the finding that Latrobe intended that Savatt remain a primary distributor pursuant to the new contract initiated with Savatt. Latrobe may not have it both ways by having Savatt believe that the contract continued his status as a primary distributor while at the same time allowing Latrobe to terminate Savatt because of what amounts, after considering the expressed understanding between the parties and the course of dealing, to an empty technicality. Although Latrobe alleges that the distributorship contract in Rosa is from the same batch of letter agreements drafted by Latrobe for its distributors as was signed by Savatt in this case, this allegation, even if true, would not mandate the same result, as Latrobe suggests. Rosa's status as primary or secondary distributor was not at issue, and without discussing the facts underlying the new contract, we assumed that Latrobe intended to designate and succeeded in designating Rosa as a secondary distributor. Rosa, 347 Pa. Super. at 557, 500 A.2d. at 1197. Nothing in Rosa conflicts with our decision today that Savatt was actually constituted as primary distributor and that the amendments have not been applied retroactively. (13a) Tony Savatt, supra, ___ Pa. Super. ___, 583 A.2d at 802-03.

Accordingly, both the questions presented by Petitioners (hereinafter collectively "Latrobe") and their Statement of Case are based on fact premises and assertions not present in this case. Without being taken to acquiesce in any of those preceived misstatements, Savatt respectfully incorporates herein the undisturbed fact findings as set forth in the Chancellor's adjudication. (15a-22a)

Summary of Argument

None of the considerations governing review on certiorari, as set forth in this Court's rules, supports the granting of the requested writ.

The factual issues which were adjudicated in this case involved application of Pennsylvania and common law precepts to

the unique facts of the case involving Latrobe's misconduct. These facts do not involve retroactive application, and the issues sought to be presented by Latrobe simply do not exist in this case.

The rulings in this case are not in conflict with any of the cases cited in the Petition, nor with any other cases of which Savatt is aware. Because there also are no special and important reasons to review the decision of the Court below, the Petition should be denied.

REASONS FOR DENYING WRIT: THE INSTANT CASE IS UNWORTHY OF REVIEW BY THIS COURT

The Petition is without the "special and important" reasons which are essential under this Court's Rule 10 to the review of the Pennsylvania Supreme Court's refusal to

review the Pennsylvania Superior Court's decision to enjoin the termination of Savatt's distributorship without good cause.

A. As Latrobe Constituted Savatt a Primary Distributor On and After the Effective Date of the Liquor Code's 1980 Amendments, the Termination for Good Cause Provision Contained in the Amendments Was Not Applied Retroactively

The sole premise upon which the Petition is based --that the Superior Court applied the termination for good cause provision of the 1980 Amendments retroactively -- is factually and legally unsound, and in total disregard of the Superior Court's ruling. Agreeing with the Chancellor that Latrobe constituted Savatt a primary distributor on and after the effective date of the 1980 Amendments, the Superior Court concluded that the termination for good cause provision

contained in the Amendments was not applied retroactively in this case. The Court stated its conclusion in unequivocal and unmistakable terms: "Having decided that the agreement at issue, which was executed on the day the amendments became effective and which was drafted in response to the amendments, constituted Savatt as a primary distributor, we reject Latrobe's argument that the 'good cause' for termination requirement has been applied retroactively." Tony Savatt, Inc. v. Latrobe Brewing Co., ___ Pa. Super. ___, 583 A.2d 796, 801 (1990).

The factual record firmly supports both the Chancellor's and the Superior Court's decisions. After the 1980 Agreement, Savatt functioned as Latrobe's primary distributor and was accorded that role.[4] Long-standing

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[4]Savatt, without objection by Latrobe, did introduce evidence of the parties' conduct prior to 1980 for the purpose of providing

principles of contract law recognize that the performance by the parties to an agreement is the best indication of what their written contract means. Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978). Accordingly, both the chancellor and the Superior Court looked to the parties' actual performance and observed that Savatt functioned after 1980 to 1988 as a primary distributor and that Latrobe's actions were consistent with that status.

Simply stated, the 1980 Amendments were not applied retroactively. Indeed, given the facts and the two lower courts' decisions, the issue of the retroactive application of a statute is inapposite here. Clearly, there is no merit whatsoever to the arguments

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comparative factual information.

Latrobe makes throughout the Petition, all of which are based upon a theoretical concept of retroactivity.

Moreover, as noted by the Superior Court, the control of the sale and use of alcoholic beverages is absolutely within the police powers of the Commonwealth, and there is no constitutional right to engage in the business of selling alcohol in Pennsylvania. Tony Savatt, 583 A.2d at 799. The Twenty-First Amendment to the United States Constitution also gives broad authority to the Commonwealth to regulate the use and sale of alcohol. Id., citing, California v. LaRue, 409 U.S. 109 (1972), rehearing denied, 410 U.S. 948 (1973). Significantly, the Commonwealth's purpose in regulating liquor has been to restrain its sale, with the Liquor Code aimed at protecting the public health and welfare. Id. at 800, citing,

Commonwealth of Pennsylvania Liquor Control Board v. Backer, 113 Pa. Commw. 373, 537 A.2d 100 (1988). Thus, Latrobe, as the Superior Court pointed out, is simply incorrect in continuing to maintain that the 1980 Amendments were merely economic in nature and that the ruling in this case violated Latrobe's constitutional rights. (Petition, pages 31-37). Finally, in regard generally to the issue of the retroactivity, the Superior Court properly stated in obiter dictum that retroactive application is not per se prohibited, and offends due process only if unreasonable. Id. at 802. See Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934).

B. The Application of the Termination for Good Cause Provision Contained in the Liquor Code's 1980 Amendments to the Contractual Relationship Between Savatt and Latrobe Complied with the Intent of Pennsylvania's Legislature

In the Petition, Latrobe makes the sweeping, yet factually hollow, statement that under the Superior Court's decision, Pennsylvania brewers are precluded from the benefits that the "Manufacturers Exemption" at § 4-431(d)(5) furnishes. (The Petition, pages 26-31). Nothing could be further from the truth. Indeed, the Superior Court recognized and upheld the § 4-431(d)(5) exemption, provided, of course, a manufacturer satisfies its terms. In this case, the Superior Court correctly held that Latrobe did not. In reaching its decision, the Superior Court was properly guided by Matt Lamb and Sons, Inc. v. Christian Schmidt

Brewing Co., 336 Pa. Super. 341, 485 A.2d 836 (1984), a case with facts that are four-square with those presented here.

Essentially, Latrobe's criticism of the Superior Court is not premised on arguments to show that its decision was contrary to the law, but, rather, is comprised of complaints that the rules enunciated and followed prevent Latrobe from conducting its business according to its own whims and desires.

Latrobe contends that the Superior Court's decision is contrary to the express intent of the Pennsylvania Legislature in enacting the § 4-431(d)(5) exemption. (The Petition, pages 29-30). The purpose of § 4-431(d)(5), as explained by Pennsylvania's Senator Zemprelli, is to permit "a Pennsylvania manufacturer to act as the primary or original supplier of his products

for any designated area, including the entire Commonwealth of Pennsylvania, if he so desires." Legislative Journal, 164 General Assembly, Senate, Vol. 2, No. 36, at 1743 (June 3, 1980). Nothing whatsoever prevented Latrobe from acting as a primary distributor of its beer. Latrobe chose not to do so, and instead, permitted and induced Savatt to assume that role. Despite Latrobe's protestations to the contrary, the § 4-431(d)(5) exemption was of no avail, not because of a legal misinterpretation of the exemption by the Superior Court, but because of Latrobe's own conduct.

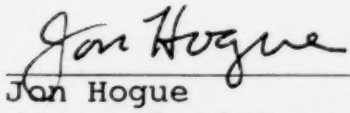
In essence, Latrobe's displeasure with the Superior Court in this case stems from its being thwarted from having it both ways. The Superior Court refused to permit Latrobe to use Savatt as a primary distributor when it suited its purposes and then to deny

Savatt that status when it did not. Now, Latrobe requests this Court do undo this just result. Clearly, Latrobe's request must be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.[5]

Respectfully submitted,



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Date: October 25, 1991

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[5] Because the Petition for Certiorari is based on a clearly incorrect factual premise, Savatt would ask this Court to adjudge double costs under Rule 43.